Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-141

ST. LOUIS UNIVERSITY,
Petitioner,

v.

BLUE CROSS HOSPITAL SERVICE, INC. OF ST. LOUIS, d/b/a BLUE CROSS PLAN OF ST. LOUIS; BLUE CROSS ASSOCIATION; and SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Respondents.

PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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Several statements in the Government's Brief in Opposition have made it necessary for Petitioner to file this reply in order to clarify the record.

1. The Government does not deny that this case is worthy of plenary review or that there is a conflict among the circuits. In fact, in footnote 7 (p. 11) of its brief, the Government indicates that it may shortly be asking this Court to review the very same issue in cases from other circuits which have been decided adversely to the Government's position.

2. The Government's suggestion that the question is not ripe for review in the instant case is clearly wrong. The Government argues that because the issue has been remanded to the Secretary, his disposition of it may render the instant case moot. The Government also suggests that petitioner may resort to judicial review following the Secretary's determination. Both contentions are utterly without foundation. In the first place, petitioner is challenging the statutory interpretation of the Secretary himself, and the Secretary has consistently rejected petitioner's position and has vigorously opposed petitioner in this very case. It is unrealistic for the Government to suggest that the Secretary might now agree with petitioner's interpretation of the Act and thereby render petitioner's claims moot. Secondly, the very decision of the Eighth Circuit which we are asking this Court to review bars any judicial review of the Secretary's order (except on equal protection grounds). Under the doctrine of the law of the case, we are at a loss to understand how the Government can assert that:

> "if, on the other hand, the Secretary upholds Blue Cross Association's determination, petitioners may then seek judicial review of the Secretary's decision in a single action raising both their judisdictional contentions and their statutory claims on the merits" (Br. in Opp. at 10).

3. Because of the virtual identity of the issues in this case and *Mathews v. Sanders*, No. 75-1443, in which certiorari was granted on June 1, 1976, we submit that this case should be accepted for review and heard along with *Mathews*. At the very least, this case should be held pending a decision in *Mathews* because a ruling that APA review is available there would require the judgment of the Eighth Circuit to be vacated.

4. The Court should be aware that the conflict among the circuits has intensified since the filing of the petition in the instant case. On September 23, 1976, the Ninth Circuit, in

Hazelwood Chronic and Convalescent Hospital, Inc. v. Weinberger, — F.2d —, 45 U.S.L.W. 2202, held that Medicare Act determinations of the type involved in this case are judicially reviewable under the APA, irrespective of section 405(h).

The Government is effectively asking this Court to deny any relief to these petitioners in spite of the fact that the Government itself has sought review in *Mathews v. Sanders* and will doubtless soon seek resolution of the precise questions presented by the instant petition. We do not believe that reviewability should be dependent upon whether the Government won or lost in the Court of Appeals.

Respectfully submitted,

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